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No. 82-768

In the Supreme Court of the United States

OCTOBER TERM, 1982

PVM REDWOOD COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has suffered a compensable taking entitling it to just compensation under the Fifth Amendment when the United States takes property of timber companies that had been supplying wood to petitioner's sawmill under contracts that expired prior to the date of the taking.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 5

TABLE OF AUTHORITIES

Cases:

Hooten v. *United States*, 405 F. 2d 1167 5

Mitchell v. *United States*, 267 U.S. 341 4-5

Omnia Commercial Co. v. *United States*, 261 U.S. 502 4

United States v. *677.50 Acres in Marion County (Clear Creek, Inc.)*, 420 F. 2d 1136, cert. denied, 398 U.S. 928 5

Constitution, statutes and rule:

United States Constitution, Fifth Amendment (Just Compensation Clause) ... 2, 4

Redwood Act, 16 U.S.C. (& Supp. V) 79a *et seq.* 1

16 U.S.C. (Supp. V) 79b 2

16 U.S.C. (Supp. V) 79c(b) 2

16 U.S.C. (Supp. V) 79k 2

16 U.S.C. (Supp. V) 79q 2

Fed. R. Civ. P. 12(b) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-15) is reported at 686 F.2d 1327. The order of the district court dismissing the complaint is not reported (Pet. App. A-16).

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1982 (Pet. App. A-1). The petition for a writ of certiorari was filed on November 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Redwood National Park was established by Congress in 1968 to preserve the redwoods along a narrow coastal belt in southern Oregon and northern California. 16 U.S.C. (& Supp. V) 79a *et seq.* Because of continuing harvesting activities in the watershed above the Park that

were endangering the survival of the trees' habitat, Congress, in 1978, amended the Redwood Act to increase the size of the Park by 48,000 acres. 16 U.S.C. (Supp. V) 79b. Congress provided for just compensation to the owners of the property taken under the 1978 legislation. 16 U.S.C. (Supp. V) 79c(b).

Included in this land was property owned by timber companies that had supplied petitioner, a sawmill operator in Northern California, with old growth redwood for its sawmill. The timber companies had provided this wood for several years based on a series of yearly contracts. Because of the expansion of the Redwood National Park, the companies refused to renegotiate the contracts with petitioner after they expired in 1977 (Pet. App. A-2).

2. Petitioner filed suit against the United States in the United States District Court for the Northern District of California, seeking damages for losses suffered because of the non-renewal of these contracts. Petitioner's complaint asserted that because its suppliers' property had been taken, petitioner had been forced to purchase logs of a poorer quality and had had to retool its machines to accommodate the new timber supply (Pet. App. A-18 to A-19). Petitioner thus asserted that the government had taken a "business interest" and had interfered with its supply contracts (Pet. App. A-19), thus entitling it to compensation under the Fifth Amendment and under various provisions of the amendments extending the Redwood National Park, 16 U.S.C. (Supp. V) 79c(b), 79k and 79q.

The district court granted the United States' motion under Fed. R. Civ. P. 12(b) to dismiss the complaint for failure to state a claim upon which relief could be granted. The court held that since all of the contracts petitioner had had with the timber companies had expired, petitioner

lacked any property interest that required just compensation (Tr. 5-6).[1]

The court of appeals, by a 2-1 vote, affirmed (Pet. App. A-1 to A-15). It held that the government had not taken any property held by petitioner because petitioner had neither been denied use of any of its own property (the sawmill) nor deprived of any ownership interest in its source of supply (Pet. App. A-2).[2]

ARGUMENT

Petitioner argues (Pet. 4) that "the federal government took a property interest that [petitioner] possessed under California state law—its ongoing contracts" and that the courts below erred in dismissing its complaint seeking compensation for that taking. This claim, which depends solely on an interpretation of petitioner's inartfully drafted complaint, was properly rejected by the court of appeals based on the proceedings before the district court.

In Count I of its complaint, petitioner alleged that its supply contracts for old growth redwood had run prior to and through the calendar year 1977. Count II merely referred generally to "ongoing contracts" (Pet. App. A-18, A-19). At the hearing held on the government's motion to dismiss, in response to the court's question as to whether or not petitioner had an "irrevocable ongoing right to take the lumber," petitioner's counsel replied "[o]nly pursuant to contracts that *would have been* negotiated from one year to the next * * *" (Tr. 4; emphasis added). Petitioner further indicated that the contracts had run out (*ibid.*).

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[1]"Tr." refers to the transcript of proceedings conducted before the district court on the government's motion to dismiss.

[2]Judge Alarcon dissented, urging that the case should be remanded to determine whether petitioner had a personal property interest in the timber on the land that was taken (Pet. App. A-6).

Thus, both the district court and the court of appeals properly found, in light of petitioner's pleadings and representations, that "what had been frustrated was an expectancy based on past experience that contracts would be entered into" and thus there was no contractual right in existence at the time of the taking (Pet. App. A-3). Petitioner cites nothing to indicate that this mere expectancy provides any basis for a claim for compensation under the Fifth Amendment. See *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923).

Indeed, even if the court of appeals were incorrect and petitioner actually did have a continuing contractual relationship with the timber companies, under prior decisions of this Court petitioner's lost interest in that contract would not have been compensable. The loss incurred by a business when the government takes its source of supply is no more than the frustration of an economic expectation, and is not a compensable taking. In *Omnia Commercial Co.* v. *United States, supra*, the government requisitioned the entire steel plate production of Omnia's supplier. This Court held that Omnia's lost supply contracts were noncompensable as mere consequential injuries. The Court stated (261 U.S. at 510; emphasis added) that the Just Compensation Clause

> has always been understood as referring only to a direct appropriation, and not to *consequential injuries* resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals.

Taking a contractually-provided source of supply, therefore, constitutes indirect harm to a business enterprise for which the United States is not liable under the Fifth Amendment. See also *Mitchell* v. *United States*, 267 U.S.

341, 343 (1925); *United States* v. *677.50 Acres in Marion County (Clear Creek, Inc.)*, 420 F.2d 1136 (10th Cir.), cert. denied, 398 U.S. 928 (1970); *Hooten* v. *United States*, 405 F.2d 1167 (5th Cir. 1969). It follows a fortiori that loss of a mere unilateral hope that supply contracts will be renewed in the future is not a compensable taking. The decision of the court of appeals is thus correct and does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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